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IN THE
Supreme Court of the United States

October Term, 1992

WILLIAM DAUBERT and JOYCE DAUBERT, Individually And As Guardians Ad Litem For JASON DAUBERT, and ANITA DE YOUNG, Individually And As Guardian Ad Litem For ERIC SCHULLER
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent injured plaintiffs in civil actions.

Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

Litigation of claims by injured victims frequently demands testimony by qualified experts to assist the jury in making factual determinations. The decision below, which sets up a new barrier to the admissibility of expert opinion, is therefore of grave concern to ATLA members.

The Seventh Amendment of the Constitution guarantees the right of litigants to have factual disputes decided by the jury. The Federal Rules of Evidence were intended to effectuate this right by removing judicial barriers to expert testimony that would assist the jury in its deliberations. In ATLA's view, the lower court's requirement that expert opinion be "peer reviewed" as a condition of admissibility not only exceeded the court's authority under the Federal Rules, but also deprived plaintiffs of the constitutionally protected right to trial by jury.

SUMMARY OF ARGUMENT

The authority of federal judges to exclude expert witness testimony from consideration by the jury in a civil case is limited, not only by the Federal Rules of Evidence, but also by the Seventh Amendment to the Constitution.

The right to trial by jury has been deemed fundamental to our system of justice and incorporated into the Constitution as an important limitation on the power of government, particularly of the judiciary. This Court has long viewed any curtailment of that right with close scrutiny.

An essential element of this right is the role of the jury in assessing the credibility of witnesses and the weight of their testimony. In this case, the lower court excluded expert opinion on the grounds that the experts' conclusions disagreed with the opinions of virtually all other experts in the field and had not been published and subjected to peer review. The court's analysis confused general acceptance of a

scientific technique or methodology, a question historically allocated to the judge, with general acceptance of the conclusions reached by a particular application of the technique or methodology. That issue goes to the credibility or weight of the evidence and is reserved for the jury.

The lower court's novel requirement for the admission of expert opinion is inconsistent with the provisions and purpose of the Federal Rules of Evidence. Moreover, since the Rules have relieved federal judges of the power to create new common-law rules of evidence, the court's action exceeded its judicial authority and intruded upon the role of Congress.

By delegating the determination of the admissibility of expert opinion to the extra judicial process of peer review, the court plainly violated the Seventh Amendment prohibition against reexamination of factual matters other than according to the rules of common law.

ARGUMENT

I. THE SEVENTH AMENDMENT REQUIRES CAREFUL SCRUTINY OF ANY CURTAILMENT OF THE RIGHT TO TRIAL BY JURY BY THE FEDERAL JUDICIARY.

The role of the judge with respect to the admissibility of evidence is broad, but not unbounded. The Federal Rules of Evidence, promulgated by this Court and enacted into law by Congress, govern the admissibility of evidence in federal courts. However, the authority to exclude evidence and thereby preclude a jury determination of disputed factual issues is limited, ultimately by the Seventh Amendment.

In this case, plaintiffs' proposed expert testimony on the issue of causation was clearly relevant, under Fed. R. Evid.

401. It appears undisputed that the experts possessed sufficient qualifications under Fed. R. Evid. 702 and that the testimony was based on facts or data of a type reasonably relied upon by experts in the field, under Fed. R. Evid. 703. Nonetheless, the lower court ruled the proposed testimony inadmissible because the experts' assessment of the underlying data had not been published and subjected to peer review. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1131 (9th Cir. 1991). Amicus suggests that the lower court exceeded the clearly defined bounds of judicial authority and thereby violated plaintiffs' right to trial by jury under the Seventh Amendment.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

Congress has restated this guarantee even more forcefully for federal courts:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. Pro. 38(a).

The importance of the right to trial by jury in our justice system can scarcely be overstated. The jury, in the Founders' view, is no mere nicety, but an indispensable safeguard of limited government. It represents, in the words of Jefferson, "the only anchor yet imagined by man, by which a

government can be held to the principles of its constitution." The Writings of Thomas Jefferson 71 (Washington ed. 1861). Indeed, the strong objections to the absence of an explicit guarantee of the right to trial by jury sparked the demand for a Bill of Rights as a condition to ratification of the constitution itself. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 298 (1966); C. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 657-59 (1973).

This Court has historically championed the right to trial by jury and has viewed any infringement with great disfavor. Describing the right to trial by jury as "a great constitutional right", this Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). *See also, Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence"); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded"); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.")

The specific target of the Seventh Amendment, as reflected by the constitutional text, is the power of the judiciary, reflecting the colonists' bitter experience with autocratic judges. *See*, R. Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); M. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). As a result,

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against

> tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (Rehnquist, J., dissenting). *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge"). The Seventh Amendment's restraint on judicial power continues to be vital. As Judge Patrick Higginbotham points out, "American federal courts . . . have a peculiar need for the democratizing influence of the jury" because an independent judiciary, essential to judicial review, also carries "its attendant risk of autocratic behavior." P. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Texas L. Rev. 47, 52 (1977).

Amicus suggests that the exclusion of plaintiffs' expert testimony in this case represents precisely the type of judicial excess that the Seventh Amendment was designed to guard against.

II. THE LOWER COURT IMPERMISSIBLY USURPED THE JURY'S FUNCTION IN ASSESSING THE CREDIBILITY OF EXPERTS AND THE WEIGHT OF EXPERT TESTIMONY.

A. The Seventh Amendment Protects The Right of Litigants To Jury Determinations Concerning Credibility of Witnesses And Weight Of Evidence.

The Seventh Amendment protects only "those incidents which are regarded as fundamental" to the system of trial by jury. *Tull v. United States*, 481 U.S. 412, 426 (1987). One such fundamental incident, indeed the central function of the

jury, is the evaluation of the evidence in reaching findings of fact. This Court has instructed:

> It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. . . Its function is to select among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter cannot be ignored.

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge."); *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983)("the fundamental premise of our entire system [is] that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and when called upon to do so, to give greater credence to one party's expert witnesses than another's.").

Of particular import in this case is Justice Black's caution in *Galloway v. United States*:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issued in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

319 U.S. 372, 407 (1943)(Black, J., dissenting). The price of the lack of such vigilance has been "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway*, 319 U.S. at 397.

B. The Lower Court's Exclusion of Plaintiffs' Expert Testimony Was Based On Judicial Assessment of Weight and Credibility.

The focus of the Ninth Circuit's decision is the proffered opinion testimony by plaintiffs' expert witnesses that Bendectin caused plaintiffs' birth defects. That opinion was based, in part, on the experts' reanalyses of epidemiological data gathered by others, leading them to conclusions which differed from those reached by the scientists who analyzed the data originally. *Daubert*, 951 F.2d at 1130.

The court ignored the fairly clear criteria set forth by the Federal Rules of Evidence with respect to the admissibility of expert testimony. It made no determination that plaintiffs' experts lacked sufficient qualifications under Rule 702 or that the underlying facts or data were not of the type reasonably relied upon by experts in the particular field under Rule 703. Instead, the court focused on the methodology of reanalysis of epidemiological studies. This, the court stated, was a "scientific technique" that "is admissible if it is generally accepted as a reliable technique among the scientific community." *Id.* at 1129, citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Whether the *Frye* test continues to be applicable at all after the enactment of the Federal Rules of Evidence is ably addressed in the Brief of Petitioners. A more fundamental error in this case lies in the peculiar application of the test. The court makes pointed reference to defendant's proffered

evidence that a survey of "more than 30 published studies . . . concluded that no published epidemiological study had demonstrated a statistically significant association between Bendectin and birth defects." 951 F.2d at 1129. The court further found "the methodology particularly problematic in light of the massive weight of the original published studies supporting the defendant's position." *Id.* at 1130.

Neither the court's discussion nor the studies cited purport to address the reliability of reanalysis of epidemiological data. Nor does the court explain why reanalysis should be deemed less reliable than original analysis. The court established only that a substantial number of experts have reached a different conclusion. Amicus submits that this choice between competing expert opinions is one which should have been made by the jury.

The court then states that the reanalyses do not meet the "general acceptance" standard because "they were unpublished, not subjected to the normal peer review process, and generated solely for use in litigation." *Id.* at 1131. Setting aside the question of whether publication and peer review in fact guarantee reliability, an issue explored in depth in Brief of Amici Curiae American Society of Law, Medicine and Ethics, they are not part of the methodology of reanalysis. At most, they indicate acceptance of the particular study by an undefined segment of the scientific community. This, like the previous point, represents little more than a nose-count of those who disagree with the particular results. In short, the court has entangled general acceptance of an expert's methodology with general agreement with the expert's conclusions.

The Ninth Circuit's rationale for shielding the jury from the proffered testimony was to prevent "confusing the issues" or "misleading the jury" because of the "aura of special reliability and trustworthiness" of scientific evidence. *Id.* at 1130. This Court issued a strong denunciation of such

paternalistic reasoning in *Barefoot v. Estelle*, 463 U.S. 880 (1983). The Court there was called upon to decide the propriety of admitting psychiatric testimony used to predict a defendant's future dangerousness. Despite virtually unanimous expert opinion that such evidence was accurate only one out of three times, this Court held that the testimony was admissible at trial.

> All these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument . . . is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process. . . .

Id. at 899.

Other courts -- even those which espouse the "general acceptance" criterion, have recognized and respected the distinction between general acceptance of a scientific technique and general agreement with the conclusions that a particular expert might reach. As the District of Columbia Court had occasion to explain, satisfaction of this criterion

> begins -- and ends -- with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology.

Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979). The court subsequently applied this sound principle in an appeal similar to the case at bar, reinstating a jury verdict in favor of a child born with limb defects. Plaintiff's expert had testified that Bendectin causes such defects. The fact that the testimony of opposing experts "revealed a disagreement as to how the epidemiological and other data should be interpreted" was a "battle in which the jury must decide the

issue." *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, 1110 (D.C. 1986).

The Fifth Circuit has also addressed this issue:

> Rachelle merely argues that because the notion that chloramphenicol can cause leukemia without first causing aplastic anemia has not been widely accepted in the medical field, the opinions of the Osburns' experts that Mr. Osburn's leukemia was caused by exposure to chloramphenicol provide insufficient evidence of causation.
>
> This argument misses the point. An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding . . . . What is necessary is that the expert arrived at his causation opinion by relying on *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions, about what caused the patient's disease.

Osburn v. Anchor Laboratories, Inc., 825 F.2d 908, 915 (5th Cir. 1987). *See also Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989)(As long as an expert's methodology is well-founded, the nature of the expert's conclusion is irrelevant to admissibility, even if it is controversial or unique).[1]

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[1]In *Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), the court appears to have imposed tighter judicial control over expert opinion, -- so tight that a vigorous and well-reasoned dissenting opinion accused the majority of "taking over" the role of deciding the reliability and weight of expert opinion in violation of the right to trial by jury. 939 F.2d at 1126 (Reavley, J., dissenting). Nevertheless, the court specifically reaffirmed the principle stated in *Osburn* and *Peteet* that where the parties' experts rely on the same methodologies but draw opposite conclusions from the available information, "a jury must be allowed to make credibility determinations and weigh the conflicting evidence." 939 F.2d at 1111.

Similarly, in *In re Swine Flu Immunization Product Liability Litigation*, 533 F. Supp. 567 (D. Colo. 1980), the district court ruled that expert opinion, based on epidemiological studies, that the vaccine caused Guillain-Barre Syndrome was admissible. The court found that the methodology used by the expert was one that was generally accepted. The fact that the results of the study had not been generally accepted by the medical community, the court stated, affected the weight, not admissibility of the expert's opinion. *Id.* at 578-79.

III. THE LOWER COURT'S DELEGATION OF THE DETERMINATION OF RELIABILITY OF EXPERT OPINION TO THE EXTRA JUDICIAL PROCESS OF PEER REVIEW VIOLATES THE SEVENTH AMENDMENT.

A. The Establishment of a New Rule of Evidence Inconsistent With the Federal Rules of Evidence Exceeded the Court's Authority.

The Ninth Circuit, though purporting to apply the *Frye* test, in fact establishes a novel and unprecedented condition to the admissibility of expert testimony. The expert's methodology "must meet *all* of the essential requirements" that are "imposed by the scientific community" including publication and peer review. 951 F.2d at 1131.

The Seventh Amendment precludes judges from reexamining any fact tried by a jury other "than according to the rules of common law." *See, e.g. Galloway v. United States*, 319 U.S. 372 (1943)(upholding the constitutionality of directed verdicts). The Federal Rules of Evidence are themselves subservient to the commands of the Constitution. Fed. R. Evid. 402. The lower court, however, does not attempt to bring its ruling within the scope of the Rules and is in conflict with them.

Common-law judges burdened the admissibility of expert testimony with a variety of artificial requirements. For most of this Century, leading evidence scholars vigorously criticized these judge-made rules as barriers to the truth-finding function of juries. *See, e.g.*, 3 J. Wigmore, Evidence §688 (1940); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. Chi. L. Rev. 285 (1943); P. Rheingold, *The Basis of Medical Testimony*, 15 Vand L. Rev. 473, 475 (1962).

The enactment of the Federal Rules of Evidence in 1975 represents a general abolition of many of these common-law barriers. *See* J. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473 (1986); Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 Rev. of Litig. 129 (1987). This Court's decisions under the Rules have consistently upheld the Rules' preference in favor of broad admissibility of scientific evidence and confidence in the jury's ability, aided by cross-examination and the adversarial process, to carry out its factfinding function. *E.g., Rock v. Arkansas*, 483 U.S. 44, 61 (1987); *see* R. Jonakit, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745, 764-67 (1990).

The Ninth Circuit's new rule is plainly inconsistent with both the language and purpose of the Federal Rules of Evidence and does not enjoy any presumption of constitutionality that might attach to the Rules. Indeed, its infringement of the right to trial by jury warrants close scrutiny. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The lower court's ruling suffers an even more basic error: The enactment of the Rules removed the authority of federal judges to create new rules of evidence in the manner of the common law. It was the intent of Congress to create a uniform and "comprehensive code of evidence" for federal courts. S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974). As a result, "under the Federal Rules, no common law of

evidence remains." *United States v. Abel*, 469 U.S. 45, 50 (1984). *See also* Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 Vand. L. Rev. 879, 881-83 (1988). This development was recognized by the Ninth Circuit, in an earlier time. *United States v. Grajeda*, 570 F.2d 872, 874 (9th Cir. 1978)("the courts are not free to establish rules of evidence independent of the Federal Rules.")

Amicus suggests that if the admissibility of scientific evidence under the Rules poses a problem for federal courts, it is a matter for Congress, not individual federal judges, to resolve.

B. The Delegation of Admissibility of Scientific Evidence to the Process of Peer Review Violates the Seventh Amendment.

Historically, judicial barriers to expert opinion have had the effect of removing reliability determinations from the jury box to the judge's bench. The lower court's rule removes those determinations from the courtroom entirely. Under the announced rule, the admissibility of expert opinion such as that proffered by plaintiffs in this case, is to be determined by an indeterminate segment of the scientific community engaged in publication and "peer review" entirely apart from and unaccountable to the judicial process.

Peer review, whatever its benefits to the world of science, does not constitute reexamination of fact "according to the rules of common law" under the Seventh Amendment. Amicus submits that the exclusion of plaintiffs' expert testimony on that basis deprived them of the right to trial by jury.

CONCLUSION

For these reasons, Amicus urges this Court to reverse the judgment of the Court of Appeals for the Ninth Circuit.

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